



that policies of fire insurance shall *run with the land*¹⁷ and be paid *as interest may appear*; where the vendor insures prior to the contract of sale, such insurance shall continue on the property until expressly cancelled by the insurer. It is realized that such a provision modifying the statutory forms of insurance policies will be fought strenuously by the insurer in the several state legislatures.¹⁸ Such opposition has been encountered and defeated on previous occasions.¹⁹

Whether it be called convenience,²⁰ universal consensus of mankind,²¹ business man's viewpoint,²² or natural justice,²³ the layman assumes that an executory contract for the sale of insured realty carries the protection of existing insurance to the purchaser. If that is the meaning in the market place, that should also be the meaning in the court room.²⁴ This can be accomplished most effectively by legislative enactment.

R. W. C.

JOINT TENANCY

JOINT BANK ACCOUNTS—JOINT TENANCY— SURVIVORSHIP

F, by letter, directed her Building and Loan Association to withdraw \$1800.00 from her savings account and deposit it in a separate account, issuing therefor a certificate of deposit in the names of "F or S or survivor," the certificate to be placed in her deposit passbook, then in the hands of the association; S to be notified of the arrangement only if she survived F. The Ohio Court of Appeals, upon reversing the trial court's judgment for the executor, because of conflict certified the record to the Supreme Court. *Held*, affirmed, the court reasoning that at the moment the company carried out the instructions of F, an executed contract arose between the company and F, enforceable by S with the attendant incident of survivor-

¹⁷ Vance, 34 YALE L. J. 87.

¹⁸ A somewhat similar amendment to the Uniform Vendor and Purchaser Risk Act was withdrawn for that reason. 44th Annual Meeting National Conference on Uniform State Laws. Milwaukee, Wisconsin, 1934.

¹⁹ Notably incontestible clause in life insurance policies.

²⁰ RICHARDS, INSURANCE (4th Ed.) 1932, sec. 245.

²¹ James dissenting in *Rayner v. Preston*, L. R. 18 Ch. Div. (Eng.) 1 (1881).

²² Vanneman, 8 MINN. L. REV. 139.

²³ Headnote in *Stent v. Bailis*, 2 P. WMS. (Eng.) 217 (1724).

²⁴ Vance, 34 YALE L. J. 90.

ship. *Rhorbacker v. Building and Loan Assn.*, 138 Ohio St. 273 (1941).

The problem of finding a transfer of a present interest in the co-depositor is the same whether the court regards the parties as joint tenants or tenants in common.¹ Transfer of title by *inter vivos* gift requires that the donor must have an intention to create a present and immediate interest in the donee, and that he must make such delivery of the subject-matter of the gift as to place it in the immediate possession and control of the donee.² To sustain a present interest in the noncontributing depositor on a trust theory, most courts require a declaration of the trust together with some act which evidences a transfer of the equitable interest from the settlor.³ The trust theory has been severely criticized inasmuch as it is difficult to find both of these elements present in any one case.⁴ An increasing number of courts hold that a present interest in the fund is conveyed to the other person by the contract of deposit,⁵ which not only indicates the creator's intention but also performs the function of delivery.⁶ Where the fund is contributed by both parties, the contract between them not only indicates the creators' intention but also satisfies the requisite delivery. In every instance where one person furnishes the entire fund, the enforceable contract is necessarily between the depositor and the financial institution. The intention to create a present interest can be found as in the first situation, while the contractual rights thereby raised in the donee-beneficiary symbolize the requisite delivery.⁷

After a present interest has been found in the co-depositor, the question then becomes one as to the character of that interest. It is well recognized that personal property is susceptible of being held by two or more parties with the right of survivorship.⁸ It is this right, as a natural incident of the tenancy, which distinguishes joint

¹ Martin, *The Incident of Survivorship in Ohio* (1937) 3 OHIO ST. L. J. 48, 60.

² BROWN, *PERSONAL PROPERTY* (1936) 75; Rice v. Bennington County Sav. Bank, 93 Vt. 493, 108 Atl. 703 (1920), 48 A. L. R. 189, 191.

³ Howard v. Dingley, 122 Me. 5, 118 Atl. 592 (1922).

⁴ Rowley, *Living Testamentary Dispositions* (1935) 3 U. OF CIN. L. R. 361, 378-389.

⁵ Notes: 48 A. L. R. 189; 66 A. L. R. 881; 103 A. L. R. 1123.

⁶ Perry v. Leveroni, 252 Mass. 390, 147 N. E. 826 (1925).

⁷ New Jersey Title & Trust Co. v. Archibald, 92 N. J. Eq. 82, 108 Atl. 434 (1919); Kaufman v. Edwards, 92 N. J. Eq. 554, 113 Atl. 598 (1921); Battles v. Millbury Sav. Bank, 250 Mass. 180, 145 N. E. 55 (1924); *In re Stover*, 218 Wis. 114, 260 N. W. 655 (1935); Hemingway, *Joint Tenancy in Joint Bank Accounts* (1931) 10 CHIC-KENT REV. 37; Note: 3 U. OF CIN. L. REV. 310 (1935).

⁸ SCHOULER, *PERSONAL PROPERTY* (5th ed.) 222 *et seq.*

tenancy from tenancy in common.⁹ Whether one or the other is created depends upon the intention of the original depositor or depositors. The power to withdraw the whole fund, and thereby extinguish the account,¹⁰ and even the retention of the power of revocation by the creator of the fund,¹¹ have been held not to be inconsistent with joint tenancy in joint accounts, and should not prevent such ownership from arising. Evidences of an intention that the parties were to own the property as joint tenants should be enough to give rise to joint tenancy.¹² Thus, if there are acts sufficient to transfer a present interest to the co-depositor, and if there is a clear intention that the property is to be jointly owned by the parties with the right of survivorship, the courts in most jurisdictions hold that a joint tenancy arises.¹³

This analysis of joint tenancy in joint funds appears to have been accepted by the Supreme Court of Ohio in *Cleveland Trust Co. v. Scobie*,¹⁴ the court apparently held there that the survivor took the fund because of the interest created by the contract, reasoning that by means of the contract the depositor of the fund created in his co-depositor an interest equal to his own.

The later case of *In re Hutchinson*,¹⁵ however, reinvoked the at-

⁹ TIFFANY, REAL PROPERTY, (3rd ed. 1939) 195. Traditionally the courts have said that before a joint tenancy may arise there must exist the four unities of interest, title, time and possession. The insistence by the courts on these unities seems to arise from a misunderstanding of the original use of the words. At their best they are a means of explaining the relation of the parties in the joint tenancy rather than requirements which must exist before the tenancy arises. CHALLIS, REAL PROPERTY *367. It is to be noticed at this point that the joint tenancy with the natural incident of survivorship has not been abolished by statute in Ohio. *In re Hutchinson Estate*, 120 Ohio St. 542, 552 (1929). Although survivorship is also a natural incident of tenancy by the entireties, this type of concurrent ownership is to be distinguished from joint tenancy in that it only exists where the parties are husband and wife.

¹⁰ *Kennedy v. Kennedy*, 169 Cal. 287, 147 Pac. 647 (1915); *McLeod v. Hennepin County Sav. Bank*, 145 Minn. 299, 176 N. W. 987 (1920); *Blick v. Cockins*, 262 Pa. 56, 87 Atl. 125 (1926). But see *Bowerman, Admx. v. Bowerman*, 67 Ohio App. 425, 428 (1941), however the right of survivorship was sustained on a different ground.

¹¹ *Kaufman v. Edwards*, 92 N. J. Eq. 554, 113 Atl. 598 (1921).

¹² Hemingway, JOINT TENANCY IN JOINT BANK ACCOUNTS, (1931) 10 CHIC-KENT REV. 37, 68.

¹³ Notes: (1934) 22 CALIF. L. REV. 450; (1940) 28 CALIF. L. REV. 224; (1930) 19 GEO. L. J. 100; (1924) 37 HARV. L. REV. FVF; (1925) 8 HARV. L. R. 243; (1927) 26 MICH. L. REV. 220; (1940) 38 MICH. L. REV. 875; (1930) ST. JOHN'S L. REV. 116; (1932) 17 ST. LOUIS L. REV. 366; (1939) OHIO ST. L. J. 191; (1928) 78 U. OF PA. L. REV. 1002; (1938) 36 YALE L. J. 138; 48 A. L. R. 189; 66 A. L. R. 881; 103 A. L. R. 1123.

¹⁴ 114 Ohio St. 241 (1926).

¹⁵ 120 Ohio St. 542 (1929). Accord: *Berberick v. Courtade*, 137 Ohio St. 297, 28 N. E. (2d) 636 (1937); *Sage v. Flueck*, 132 Ohio St. 377, 7 N. E. (2d) 802 (1936); *Oleff v. Hodapple*, 29 Ohio St. 432, 195 N. E. 838, 98 A. L. R. 764 (1935).

titude of the Ohio courts, which had prevailed prior to the *Scobie* decision,¹⁹ that the right of the survivor arises from the contract and not as an incident of demonstrated joint tenancy. Cases like the principal one which adhere more to the *Hutchinson* view stress the contract as a technical requirement for the finding of joint tenancy; they have not considered the contractor's function as a vehicle for transferring an interest to the transferee, whether in joint tenancy or otherwise. This unique approach, while it does not preclude correct judicial disposal of many of the situations litigated, can easily lead to erroneous decisions in two classes of cases: (1) the denial of the right of survivorship where no contract is present in the transaction, even though a present interest has been created and the intention is clear that the property was to be owned by the parties as joint tenants; (2) the finding of the incident of survivorship where no present interest was in fact created. That such possibilities are more than academic the present case itself bears witness, for the evidence seems to indicate that F intended to make a testamentary disposition of her money rather than to transfer a present interest in it to S. Such a transaction fails as not fulfilling the requirements of the statute of wills.¹⁷ Even if this was not the intention of F, still there are a great number of courts which hold that a present interest is not created where, as here, the co-depositor does not have the right of withdrawal during the life time of the depositor.¹⁸

D. W. P.

¹⁹ In an early real property case, *Lewis v. Baldwin*, 11 Ohio 352 (1842), the court said that the survivor held title, not upon the principle of survivorship as an incident of joint tenancy, but as grantee in fee, as survivor, by the operative words of the deed. The seed of this concept is to be found in an earlier Ohio case, *Sargent v. Steinberger*, 2 Ohio 305, 15 Am. Dec. 553 (1826). The Ohio cases are discussed and collected in Martin, *supra*, note 1, at 60 n.

¹⁷ Ohio G. C. §10504-3.

¹⁸ Notes: 48 A. L. R. 198; 66 A. L. R. 286; 103 A. L. R. 1129.